Supreme Court, U.S.
FILED
DEC 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-511

In The

Supreme Court of the United States

October Term, 1989

PATRICIA KWALLEK,

Petitioner,

vs.

ROGER ENDELL, COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS, and HAROLD BROWN, ATTORNEY GENERAL OF THE STATE OF ALASKA,

Respondents.

REPLY BRIEF OF PETITIONER PATRICIA KWALLEK

DANIEL WESTERBURG
BIRCH, HORTON, BITTNER AND CHEROT
1127 West Seventh Avenue
Anchorage, Alaska 99501
(907) 276-1550

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Argument 1

THIS CASE SHOULD BE USED TO CLARIFY WHEN PROSECUTORIAL COMMENT ON A DEFENDANT'S EXERCISE OF FIFTH AMENDMENT RIGHTS CONSTITUTES REVERSIBLE ERROR.... 1

A. The "Impermissible Comment" Argument Was Presented to, and Considered by, The State Courts 1

B. In Light of *Greer v. Miller,* This Court Should Clarify the Harmless Error Standard in Cases Involving an Impermissible Comment on the Defendant's Decision to Remain Silent 3

Conclusion 5

TABLE OF AUTHORITIES

Page

CASES

Chapman v. California, 386 U.S. 18 (1967) 4

Doyle v. Ohio, 426 U.S. 610 (1976) 3, 5

Greer v. Miller, 483 U.S. 756 (1987) 3, 4, 5

Huffman v. Ricketts, 750 F.2d 798 (9th Cir. 1984) 2

Miranda v. Arizona, 384 U.S. 436 (1966) 1

Wainwright v. Sykes, 433 U.S. 72 (1977) 1

Walker v. Endell, 850 F.2d 470 (9th Cir. 1988); *cert. den.*, 109 S.Ct. 309, 530; 102 L.Ed.2d 328, 562 (1988) 2

ARGUMENT

THIS CASE SHOULD BE USED TO CLARIFY WHEN PROSECUTORIAL COMMENT ON A DEFENDANT'S EXERCISE OF FIFTH AMENDMENT RIGHTS CONSTITUTES REVERSIBLE ERROR.

A. The "Impermissible Comment" Argument Was Presented to, and Considered by, the State Courts.

At page 24 of its brief, the State argues that Mrs. Kwallek did not properly preserve her "impermissible comment" argument in the state trial court and the Ninth Circuit, therefore, should have required her to demonstrate "cause and prejudice" for her procedural default under *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In response, Mrs. Kwallek offers the following. First, whether Mrs. Kwallek properly preserved the "impermissible comment" issue in the state courts is not properly before this court. Since the Ninth Circuit rested its decision entirely on "harmless error" grounds, the preservation issue is not yet ripe for review.

Second, as explained at pages 7-8 of Mrs. Kwallek's petition, the impermissible comment argument *was* properly submitted to the trial court in the form of a pretrial motion to suppress. Had the trial court agreed with Mrs. Kwallek's analysis, it would have been required by *Miranda v. Arizona*, 348 U.S. 436 (1966), to suppress not only the substantive portion of the statement, but also those portions where Mrs. Kwallek had invoked her right to silence. *Id.* at 384 U.S. 468, n. 37. Since Mrs. Kwallek's *Miranda* motion was denied, the entire statement – including Mrs. Kwallek's repeated requests to break off the interview – was presented to the jury.

Both Magistrate Jamin and District Court Judge Holland agreed that Mrs. Kwallek had properly preserved the "impermissible comment" argument at the trial level. (App. 16; 49-50.) The District Court specifically held "that petitioner sufficiently raised to the trial court, and the appellate in fact considered, the merits of the question of whether or not the transcript of petitioner's interview should be redacted so as to delete questions and answers concerning her right to remain silent." (App. 16.) This conclusion was never challenged by the Ninth Circuit.

Third, in any event, since the Alaska Court of Appeals squarely addressed the merits of the "impermissible comment" argument while conducting its plain error analysis, that court's determination on the merits of the issue is subject to later *habeas* review by the federal courts. *Walker v. Endell*, 850 F.2d 470, 473-474 (9th Cir. 1988); *cert. den.*, 109 S.Ct. 309, 530; 102 L.Ed.2d 328, 562 (1988) (where the Alaska Court of Appeals considers the merits of a federal constitutional argument in conducting a plain error analysis, that issue may be raised in a federal *habeas* proceeding); *Huffman v. Ricketts*, 750 F.2d 798, 800-801 (9th Cir. 1984). This was the conclusion reached by the District Court. (App. 16.)

In light of the foregoing, the State's suggestion that Mrs. Kwallek did not properly preserve certain arguments in the state courts is a red herring. The only issue presented to *this* court is whether the Ninth Circuit properly determined that the constitutional violation, if it occurred, was harmless error.

B. In Light of *Greer v. Miller*, This Court Should Clarify the Harmless Error Standard in Cases Involving an Impermissible Comment on the Defendant's Decision to Remain Silent.

The State correctly points out that the Ninth Circuit purportedly applied the "harmless beyond a reasonable doubt" standard to the constitutional violation which tainted Mrs. Kwallek's trial. The State then concludes that whether a lesser "substantially affected the course of the trial" standard should apply in *habeas* cases (the issue left open in *Greer v. Miller*, 433 U.S. 756 (1987)) is a moot question.

Again, Mrs. Kwallek has several responses. First, should the court grant the petition, presumably the entire issue of when *Doyle*[1] violations constitute reversible error in *habeas* cases would be ripe for consideration. Thus, the issue left open in *Greer* could be decided.

Second, apart from the narrow issue left open in *Greer*, it is evident by the varying approaches taken by members of this court in that case that there remains sharp disagreement as to what circumstances constitute reversible error in a *Doyle* case. Since this general issue is squarely presented in this case, granting the petition would offer the court an excellent opportunity to fully address the question.

Third, like this court, the lower courts have been struggling with the effect of *Doyle* violations. In *Greer*, for example, the state and federal judges who considered whether the *Doyle* violation constituted reversible error

---

[1] *Doyle v. Ohio*, 426 U.S. 610 (1976).

reached widely varying conclusions.[2] The same thing happened here. On the state side, the trial court found in favor of the state; the Alaska Court of Appeals affirmed the conviction in a split 2-1 decision; and the Alaska Supreme Court denied Mrs. Kwallek's petition for hearing on a 3-2 vote. On the federal side, the federal magistrate and district court judge found in favor of Mrs. Kwallek. On appeal, a sharply divided panel of the Ninth Circuit reversed and reinstated the conviction.

With this much judicial disagreement afoot, the time has come for a post-*Chapman*[3] case to further clarify the circumstances under which state violation of a defendant's right to silence can constitute reversible error. The present case presents an excellent vehicle for a full discussion of this issue. The case dovetails nicely with *Greer*, where the prosecutorial comment was brief and immediately cured by a prompt instruction from the court. In contrast, here, the improper evidence included an exhibit submitted to the jury which demonstrated that, when pressed for incriminating details, Mrs. Kwallek

---

[2] The state trial court did not believe that the prosecutor's improper question warranted a mistrial. The Illinois Court of Appeals disagreed, reversing the conviction. The Illinois Supreme Court disagreed with the Illinois Court of Appeals and reinstated the conviction. On *habeas* review, the Federal District Court agreed with the Illinois Supreme Court and denied the *habeas* petition. A divided Seventh Circuit Court of Appeals, in turn, reversed the District Court and vacated the conviction. Here, still another divided court reversed yet again and reinstated the conviction. *Greer v. Miller*, 483 U.S. at 759-761.

[3] *Chapman v. California*, 386 U.S. 18 (1967).

repeatedly attempted to break off the interview. The resulting prejudice was exacerbated by Sergeant Lown's trial testimony that "Patsy didn't want to talk anymore."[4] Further, unlike *Greer*, there was no prompt curative instruction. Thus, while *Greer* may present a situation where no *Doyle* violation occurred, the present case demonstrates where it constitutes reversible error.

CONCLUSION

As is evident by the procedural histories of *Greer* and the present case, few issues divide the judiciary as sharply as the circumstances in which a *Doyle* violation constitutes reversible error. By accepting Mrs. Kwallek's petition, the court could go a long way toward clarifying the issue for the lower courts.

---

[4] The State points out that the transcript was "one of 94 trial exhibits," suggesting that it would not have been seriously considered by the jury. The State's argument is disingenuous. Surely, in a first-degree murder case, the jury would pay particularly close attention to a transcribed interrogation session of the defendant taken the day after the murder. The same holds true for the testimony of Sergeant Lown. Lown was the chief investigating officer assigned to the case; was the State's most important witness; and was on the stand longer than any other witness during the trial.

For all of these reasons, Mrs. Kwallek respectfully requests that her petition for writ of certiorari be granted.

DATED this 27th day of December, 1989, at Anchorage, Alaska.

BIRCH, HORTON, BITTNER AND CHEROT
Attorneys for Patricia Kwallek

Daniel Westerburg